88-1871

Supreme Court, U.S.
FILED
MAY 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Petitioner*

vs.

LARRY V. BROWN, *Respondent*

Petition for Writ of Certiorari

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QUESTIONS PRESENTED.

1. *Supremacy Clause.* When the Federal Employers' Liability Act and its time-honored application by this Court conflict with a state's policy against appellate review, is the state's policy pre-empted?

2. *Due Process and Equal Protection.* In a suit brought under the F.E.L.A. should a state's policy against appeals of orders granting new trials be applied in direct contravention of due process and equal protection to *preclude all review* of an erroneous order setting aside a jury's verdict?

3. *Uniform Application of F.E.L.A.* When trial court orders setting aside jury verdicts are reviewable under the procedures of 45 other states and most federal courts, should a maverick state court policy be allowed to frustrate uniform application of the F.E.L.A.?

4. *Opinions of This Court Delivered After Decision Below.* Do the recent opinions of this Court in *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. ____, 100 L.Ed.2d 349 (1988), and in *Felder v. Casey*, 487 U.S. ____, 101 L.Ed.2d 123 (1988), delivered after the opinion below, require the Texas rule against appellate review to yield to the federal primacy of a fairly obtained F.E.L.A. verdict?

5. *The Erroneous Opinion Below.* Does the F.E.L.A. protect only employees?

6. *The Railroad Becomes an Insurer.* In an F.E.L.A. case does the railroad simply become an insurer when its right to judgment upon a fairly obtained exonerating verdict is thwarted?

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LARRY V. BROWN, *Respondent*

Petition for Writ of Certiorari

Petitioner, The Atchison, Topeka and Santa Fe Railway Company (hereinafter "Santa Fe"),[1] respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the Court of Appeals of Texas for the Eleventh Supreme Judicial District of Texas.

THE JUDGMENTS AND OPINION BELOW.

The Court of Appeals rendered its decision by opinion published at 750 S.W.2d 332. The opinion is reproduced at Appendix 1. The unpublished orders and judgments overruling or denying Santa Fe's motion for rehearing, Santa Fe's application to the Supreme Court of Texas for writ of error, and Santa Fe's motion for rehearing in the Supreme Court of Texas, are reproduced at Appendix 2.

JURISDICTION.

1. This petition is authorized by 28 U.S.C. §1257(3); the opinion and judgment to be reviewed were rendered by the

[1]Santa Fe is a wholly owned subsidiary of Santa Fe Industries Incorporated, a wholly owned subsidiary of Santa Fe Pacific Corporation.

Court of Appeals of Texas – in this case the highest court of Texas. The Supreme Court of Texas denied Santa Fe's timely application to review such opinion and judgment.

2. This suit was filed under the provisions of the Federal Employers' Liability Act.

3. The judgment and opinion of the Court of Appeals are dated April 28, 1988.

4. The order overruling Santa Fe's motion for rehearing in the Court of Appeals is dated June 9, 1988.

5. The order denying Santa Fe's application for writ of error to the Supreme Court of Texas is dated January 25, 1989.

6. The order overruling Santa Fe's motion for rehearing of its application for writ of error to the Supreme Court of Texas is dated March 1, 1989.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED.

The questions presented require application of the Supremacy Clause, the Due Process and Equal Protection Clauses, and the Federal Employers' Liability Act, 45 U.S.C.A. sec. 51 *et seq.* (West 1986) (hereinafter "F.E.L.A.").

STATEMENT OF THE CASE.

This is a suit for personal injury damages brought by Larry V. Brown (hereinafter "Brown") against Santa Fe under the F.E.L.A. A jury fairly exonerated Santa Fe of liability, but a new trial was erroneously granted, a second jury returned a verdict favorable to Brown, and now the Texas policy against review of orders granting new trials conflicts with Santa Fe's federal right to judgment upon the first verdict. The issue to be decided is whether a state's policy against appellate review of orders granting new trials may extinguish a purely federal claim, even when this policy is contrary to proper procedure in most federal courts and in 45 other states also applying the F.E.L.A.

Brown broke an ankle when he slipped on winter ice that had formed on a railroad car. Santa Fe vigorously denied liability. The case was first tried in the fall of 1986. No error justifying a new trial was committed. A unanimous jury returned a verdict exonerating Santa Fe. Brown filed a motion for new trial and the trial court granted Brown's motion. Despite Santa Fe's efforts, this order has *not been reviewed* by an appellate court.

In the spring of 1987, the case was called for a second trial. Santa Fe was granted six pre-emptive juror strikes and 30 veniremen were summoned. But seven of these potential jurors had sustained a broken ankle, or a spouse or child had sustained a broken ankle.[2] The second jury returned a verdict favorable to Brown and judgment was rendered against Santa Fe for the sum of $336,775.00.

Santa Fe perfected an appeal to the Court of Appeals of Texas and sought to reinstate the verdict of the first jury. Brown contested appellate review citing a policy of Texas courts against appeals of orders granting new trials *in ordinary cases*. Santa Fe joined issue relying upon several well-known opinions of this Court. The questions presented were thus raised for the first time in the Court of Appeals and are the sole basis of the opinion to be reviewed.

The Court of Appeals says the opinions of this Court grant substantive rights *only to injured employees*. The court below refused to review the erroneous new trial order to determine if the trial court abused its discretion.

Thirty-nine days after the Texas Court of Appeals rendered its decision, this Court held the F.E.L.A. protects railroads when state procedural laws stand in the way. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. ____, 100

[2]This was a truly remarkable coincidence. That seven persons would have this common history of injury in a county of 17,600 and be randomly selected for a broken-ankle case is against staggering mathematical improbability. Although the injury occurred in Fort Worth, Texas, where Brown resided, he chose to file suit in Sweetwater, Texas, a small county seat 200 miles west of Fort Worth. Both trials were held in Sweetwater.

L.Ed.2d 349 (1988). Sixteen days after the *Monessen* opinion was delivered, this Court again said, in sustaining a civil rights appeal, when state procedure conflicts with a substantial federal claim, state rules must yield. *Felder v. Casey*, 487 U.S. ____, 101 L.Ed.2d 123 (1988).

That the Texas Court of Appeals *did not* find error in the first trial is of great importance. A finding of error would have ended Santa Fe's appeal without risky adventure by the court below into the murky swirl of federal substantive rights in conflict with hostile state procedural policy. Instead, the court below held Santa Fe had no federal claim to judgment on its verdict because the F.E.L.A. protects *only employees*, and refused to review the erroneous order setting aside the jury's verdict.

The questions presented here were duly and timely presented to the Supreme Court of Texas in Santa Fe's application for writ of error. Both the application and a motion for rehearing of the application were denied. Review of the trial record is not necessary; this petition rests simply upon (1) misapplication below of this Court's opinions, (2) an absolutely incorrect statement below of Fifth Circuit law, and (3) a substantial federal question not previously considered by this or any other court.

REASONS FOR GRANTING THE WRIT.

A. Case of First Impression: Right of Appellate Review – State Procedure in Conflict with Federal Right.

Eighty years ago Congress began requiring states to provide forums for trial of F.E.L.A. suits. Congress did not intend, however, to allow state procedure to frustrate the purpose of the Act. This Court has said so many times. But the trial of federal rights in state forums has resulted too frequently in vexing conflicts with local procedure. The following

is the relevant collection of this Court's work in reconciling these conflicts:[3]

Felder v. Casey, 487 U.S. ____ ; 101 L.Ed.2d 123 (1988);	State **notice-of-claim** requirements were pre-empted in section 1983 action;
Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. ____ ; 100 L.Ed.2d 349 (1988);	Pennsylvania's **procedural rule requiring pre-judgment interest** on F.E.L.A. verdict was pre-empted;
Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 358 (1951);	Ohio's **rule that trial court, not a jury, should decide fraud issues** in connection with an employee's release of an F.E.L.A. claim, was pre-empted;
Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949);	Georgia's **rule construing pleadings** most strongly against the pleader was pre-empted by the F.E.L.A.;
Arnold v. Panhandle & Santa Fe Ry., 353 U.S. 360 (1957);	Texas' test for resolving **conflicts in jury findings** was pre-empted by the F.E.L.A.;
Brady v. Southern R.R. Co., 320 U.S. 476 (1943);	North Carolina's application of its **sufficiency-of-the-evidence** standard to require court, not jury, to review jury's finding, was pre-empted by the F.E.L.A.;

[3]More comprehensive, but somewhat out-of-date, descriptions of conflicts between F.E.L.A. substantive rights and state procedure are found in Annotation, *Local Law and Practice as Applicable to Actions Under Federal Employers' Liability Act–Supreme Court Cases*, 96 L.Ed. 408 (1952), and Annotation, *Applicability of State Practice and Procedure in Federal Employers' Liability Act Actions Brought in State Courts*, 79 A.L.R.2d 553 (1959).

Central Vermont R. Co. v. White, 238 U.S. 507 (1915);	Vermont's **rule of procedure for burden of proof** was pre-empted by the F.E.L.A.;
Davis v. Wechsler, 263 U.S. 22 (1923);	Missouri's **venue rule** was pre-empted when it resulted in denial of railroad's federal right to recover take-nothing judgment.

Contrary to the opinion of the Texas Court of Appeals, the above line of authority is not distinguishable from the case at bar. It is clear, however, that this is a case of first impression – no court has passed on the question raised by preclusion of appellate review when such preclusion destroys a substantial federal right.

This Court has not hesitated to pre-empt the most basic foundations of Texas *substantive* law to preserve federal rights. For example, in *Free v. Bland*, 369 U.S. 663 (1962), Texas' ancient community property system was superceded to enforce right-of-survivorship provisions in United States Savings Bonds. The issue here is easier to decide and does not involve pre-emption of bedrock substantive law, but of a state judge-made rule of court.[1]

No court other than the court below has decided precisely whether a state court's policy against appellate review is pre-empted in F.E.L.A. or other federal rights cases. The Texas Court of Appeals could not find a case in point, and says so in the opinion below. Clarification will advance judicial administration of this frequently litigated federal right of action, while serving justice in the instant case: a central element of due process – appellate review – has been wholly precluded here, a substantial federal right now hangs in the balance.

[1]The "rule" in question is not found in the Texas Rules of Civil Procedure, but has evolved as policy intended to reduce congested appellate court dockets. This policy is stated in three or four lower appellate court opinions and in the short *per curiam* opinion, *Cummins v. Paisan Construction Co.*, 682 S.W.2d 235 (Tex. 1984).

B. Fifth Circuit Encourages Review of Orders Granting New Trials.

Trial of this case in federal court would have yielded a different result: the order granting a new trial would have been closely scrutinized by the United States Court of Appeals for the Fifth Circuit. *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927 (5th Cir. 1982); *Evers v. Equifax, Inc.*, 650 F.2d 793, 796 (5th Cir. 1981). The opinion below now challenged by this petition says the law of the Fifth Circuit is to the contrary, but the learned Texas Court of Appeals is simply dead wrong. The sole Fifth Circuit opinion cited by the Texas Court of Appeals, *Gallimore v. Missouri Pacific R.R. Co.*, 635 F.2d 1165 (5th Cir. 1981), was delivered before the decisions in *Shows* and *Evers*, and in any event, *Gallimore* does not hold orders granting new trials are not reviewable on appeal. Indeed, when the Fifth Circuit has had the opportunity to do so, it has *favored* review of orders granting new trials:

> When the trial judge has refused to disturb a jury verdict, all the factors that govern our review of his decision favor affirmance. . . . When the trial judge sets aside a jury verdict and orders a new trial, however, our deference to him is in opposition to the deference due the jury. Consequently, in this circuit as in several others, we apply a *broader* review to orders granting new trials than to orders denying them. . . . And where a new trial is granted on the ground that the verdict is against the weight of the evidence, we exercise particularly close scrutiny, to protect the litigants' right to a jury trial.

Shows v. Jamison Bedding, Inc., 671 F.2d at 930 (emphasis added). The above holding in *Shows* is precisely the Fifth Circuit view Santa Fe seeks to vindicate.

C. Primacy of F.E.L.A. Verdicts – Federal Claim to Judgment.

All aspects of F.E.L.A. actions are generally accorded deference by the Courts to promote Congress' purpose of effective resolution of claims by employees against carriers in

interstate commerce. *Arnold v. Panhandle & Santa Fe Ry.*, 353 U.S. 360 (1957); *Brown v. Western Ry. of Alabama*, 338 U.S. 294 (1949). In adopting the F.E.L.A., however, Congress did not intend to repeal the railroads' right to trial by jury, nor did it intend to make railroads insurers. *Wilkerson v. McCarthy*, 336 U.S. 53 (1949); *Tracy v. Terminal R. Ass'n of St. Louis*, 170 F.2d 635 (8th Cir. 1948).

Most courts are reluctant to disturb a jury's verdict in any case, but a special doctrine of verdict deference has evolved under the F.E.L.A. Even in the face of otherwise harmful error, this Court has created and upheld an overriding rule that judgment shall be rendered upon the jury's decision. *Lavender v. Kurn*, 327 U.S. 645 (1946); *Rogers v. Missouri Pacific Ry. Co.*, 352 U.S. 500 (1957); *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 358 (1951); *Brown v. Western Ry. of Alabama*, 338 U.S. 294 (1949); and *Arnold v. Panhandle & Santa Fe Ry.*, 353 U.S. 360 (1957). The Supreme Court of Texas has acknowledged the primacy of F.E.L.A. verdicts, yet in refusing to grant Santa Fe's application for writ of error, has ignored its own precedent. *See Texas and Pacific Ry. Co. v. Roberts*, 482 S.W.2d 798 (Tex. 1972).

Exoneration by a jury therefore gives rise to a federal claim for recovery of judgment for the railroad; erroneous orders contravening this substantive right should be rigorously scrutinized. *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927 (5th Cir. 1982). When appellate review of an erroneous order thwarting a federal claim is *entirely precluded* by a local rule of practice, the Supremacy Clause commands the local rule to yield to federal law. U.S.C.A. Const. Art. VI.

The Texas Court of Appeals now elevates a Texas procedural policy over Santa Fe's dual rights of appellate review and recovery of judgment. This error is particularly vexing to Santa Fe because the order granting the new trial is so clearly erroneous under even the strictest abuse-of-discretion standard.

The Court of Appeals says Santa Fe has not been denied a substantive right. Yet the right of appeal in Texas has been held many times to be a valuable right, "zealously safeguarded". *Bay v. Mecom*, 393 S.W.2d 819 (Tex. 1965), *cert. denied* 389 U.S. 927; *Pratley v. Sherwin Williams Co.*, 36 S.W.2d 195 (Com.Ap. 1931, holding approved); *Davis v. Hawn Lumber Co.*, 193 S.W.2d 263 (Tex. Civ. App. – Dallas 1946, no writ). The learned Court of Appeals cites no authority holding appellate review of an erroneous order is not a substantive right. When state policy collides with a federal right, state courts must have the courage to say their local rules of practice must yield. When a community property system rooted in the Texas constitution was overturned – a profound pre-emption indeed – this Court said, "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free v. Bland*, 369 U.S. at 666. A maverick, seldom-applied policy of state procedure should not enjoy greater immunity from pre-emption.

Usually the employee recovers judgment against the railroad; this is as Congress intended. However, the equal protection clause insures like treatment for the railroad in the rare instance of a jury's verdict in its favor, and guarantees the same substantive federal right to recover judgment. The same line should be drawn for employee and employer alike after the return of a verdict: equal protection requires of the courts the same aggressive protection of one class of litigants as it does for the other.[5] The intendments in favor of the employee vanish when a jury fairly exonerates the railroad; otherwise the railroad becomes an insurer, contrary to the Act. *Wilkerson v. McCarthy*, 336 U.S. 53 (1949); *Tracy v. Terminal R. Ass'n of St. Louis*, 170 F.2d 635 (8th Cir. 1948).

A Texas procedural ground used to nullify Santa Fe's federal claim should not be upheld if, as here, it falls below the mini-

[5]"There is no greater inequality than the unequal treatment by the same court of things that are equal." *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 439 (Tex. 1984) (dissenting opinion, Pope, CJ).

mum requirement of due process. *Saunders v. Shaw*, 244 U.S. 317 (1917); *Brinkerhoff-Farris Trust & Savings v. Hill*, 281 U.S. 673 (1930). It is a violation of fundamental due process standards to deprive a party of all existing remedies for the enforcement of a right. *See* 16 C. Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE sec. 4025-4029 (1977). Professor Wright teaches that a denial by a state of all existing remedies for the enforcement of a federal right is contrary to due process:

> This general independence of state procedure stands in sharp contrast to the underlying obligation to hear federal claims. In most situations it is clear that state courts are required to decide properly presented federal questions.
>
> * * *
>
> State procedural grounds for disregarding federal claims cannot be found adequate if they fall below the requirements of due process. At times, the inadequacy of state grounds has in fact been explained in due process terms. The major decisions are described below. It should be observed at the outset, however, that the due process test is more a limitation on the independence of state procedural choices than a measure of adequacy. *This view of the due process test is important both in situations in which state courts would be free to deny any opportunity whatever for consideration of a federal claim*, and in situations in which they are obliged to entertain a properly presented federal claim.
>
> There are at least two obvious reasons for emphasizing the independence aspect of the due process limits even in situations in which state courts need not consider a federal claim at all. First, it is clear that due process is not a necessary basis for disregarding state procedural grounds. State grounds may be found inadequate without descending to a denial of due process. Second, the requirements of due process apply to state court enforcement of state rights as well as federal rights – *state procedure can never be independent of the requirements of*

> *due process*. There would be Supreme Court jurisdiction to review a state decision that refused consideration of any claim, state or federal, on procedural grounds that fell below due process requirements.
>
> * * *
>
> Unreasonable procedural requirements could not be allowed to deny consideration of the claim without destroying the obligation to entertain it. This principle is easily illustrated by cases in which state court defendants assert constitutional objections to conviction or the imposition of liability.
>
> * * *
>
> Due process tests have also been employed in cases that center on the failure of a state court to provide a remedy for a federal right. Several of these cases focus primarily on the conclusion that state remedial grounds were inadequate to support denial of any remedy [citing *Ward v. Board of County Commissioners of Love County*, 253 U.S. 17 (1920)].

16 C. Wright *et al.* FEDERAL PRACTICE AND PROCEDURE sec. 4024- 4025 (1977) (emphasis added).

Congress intended to provide injured employees with a remedy, but it also intended railroads to have remedies against becoming insurers under the Act. *Wilkerson v. McCarthy*, 336 U.S. 53 (1949); *Tracy v. Terminal R. Ass'n of St. Louis* 170 F.2d 635 (8th Cir. 1948). Judgment upon a fairly obtained exonerating verdict, and appellate review of orders to the contrary, are the very essence of the railroads' remedies. Texas cannot Constitutionally withhold them.

D. Adequacy of Due Process: Functional Testing.

A functional test should be used to determine whether Santa Fe was afforded adequate due process. This test was applied long ago in *Davis v. Wechsler*, 263 U.S. 22 (1923), and continues to be used. *See* 16 C. Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE, sec. 4027 (1977). This

Court most recently employed a functional test in *Felder v. Casey*, 487 U.S. ____, 101 L.Ed.2d 123 (1988). *Felder* is not an F.E.L.A. decision, but the opinion relies heavily upon the authority of *Brown v. Western Ry. of Alabama*, 338 U.S. 294 (1949).[6] *See Felder v. Casey*, 487 U.S. at ____, ____, and ____, 101 L.Ed.2d at 137, 146, and 147. In *Felder* this Court thoroughly repudiated a state's use of an outcome-determining notice-of-claim procedure. When a functional test is thus applied to Texas' no-appeal policy, the policy cannot meet due process standards because "no appeal" obviously means "no remedy."

Suit in *Davis v. Wechsler* was filed against a federal railroad. The defendant, the Director General of Railroads, filed both a general denial and a plea to the jurisdiction of the state court. The railroad claimed all suits against railroads under federal control must be brought in the county of the plaintiff's residence at the time of injury. A succeeding Director General was then substituted for the original defendant and he appeared in the case. The state court overruled the defensive plea and held it was, in any event, waived by the appearance in the suit of the defendant. The opinion by Justice Holmes reaches an entirely different conclusion, however:

> Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. . . . The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. . . . If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it, even upon local grounds. . . . This is familiar as to the substantive law and for the same reasons it is necessary to see that

[6] *Brown* is discussed in detail below beginning at page 16.

> local practice shall not be allowed to put unreasonable obstacles in the way.

Davis v. Wechsler, 263 U.S. at 24-25. Justice Holmes is obviously troubled by a state court ruling that in effect says a federal claim can be defeated by an outcome-determining local rule of practice, circumstances no different from Santa Fe's federal right to recover judgment after exoneration by the first jury.

E. F.E.L.A. Opinions.

1. *Monessen Southwestern Ry. Co. v. Morgan.*

Rule 238 of the Pennsylvania Rules of Civil Procedure allows recovery of pre-judgment interest by successful plaintiffs. This local rule was adopted to promote settlement and to relieve congestion in the trial courts of Pennsylvania. *Monessen Southwestern Ry. Co. v. Morgan*, 513 Pa. 86, 98-99, 518 A.2d 1171, 1177 (1986). The policies underlying the Pennsylvania rule therefore bear a close similarity to those underlying the Texas policy against appellate review of orders granting new trials.

The F.E.L.A. does not provide recovery of pre-judgment interest. When Pennsylvania affirmed recovery of pre-judgment interest under its Rule 238, this Court reversed:

> . . . [T]he Pennsylvania courts erred in treating the availability of pre-judgment interest in F.E.L.A. actions as a matter of state law rather than federal law.
>
> The Pennsylvania courts cannot avoid the application of federal law to determine the availability of pre-judgment interest under F.E.L.A. by characterizing Rule 238 as nothing more than a procedural device to relieve court congestion. In *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952), the Ohio courts had applied a state procedural rule in an F.E.L.A. action that permitted the judge rather than the jury to resolve factual questions as to whether a release had been fraudulently obtained. We reversed on the ground that "the right to

> trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used." *Id.*, at 363. See also *Brown v. Western Ry. of Alabama*, 338 U.S. 294, 298-299 (1949). Similarly, pre-judgment interest constitutes too substantial a part of a defendant's potential liability under F.E.L.A. for this Court to accept a State's classification of a provision such as Rule 238 as a mere "local rule of procedure."

Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. ____, 100 L.Ed.2d at 358. Thus the railroad was protected from an award of pre-judgment interest otherwise mandated by a state's rule of procedure.

The facts at bar are parallel; appellate review of an erroneous trial court order is no less inseparably connected with the federal right of action, no less an issue of substance that must be settled according to general principles of law as administered in the federal courts. In *Monessen* this Court dealt with the proper measure of damages; in this case the Court would consider the right of appellate review. The Texas Court of Appeals could not benefit from Justice White's opinion because *Monessen* was decided a few days after the court below delivered its opinion, but it is clear the Texas holding turns on the erroneous notion that the *Dice* line of cases protects only employees. *Monessen* unequivocally demonstrates the error of this narrow view.

2. *Arnold v. Panhandle & Santa Fe Ry.*

In *Arnold v. Panhandle & Santa Fe Ry.*, 353 U.S. 360 (1957), extraordinary protection was afforded to an F.E.L.A. verdict to justify rejection of the traditional Texas test for resolving conflicts in Texas jury findings. The jury was charged under Texas' special issue procedure. Nothwithstanding the jury's return of conflicting answers (viewed as such under long-established Texas procedure), the *Arnold* Court pre-empted traditional local procedure to protect rights

conferred by Congress, and it did so because, as in the case at bar, a jury returned a verdict upon which a judgment could be rendered *notwithstanding Texas' rules of procedure to the contrary*:

> The petitioner having asserted Federal rights governed by Federal law, it is our duty under the Act to make certain that they are fully protected, as the Congress intended them to be. We therefore cannot accept interpretations that nullify their effectiveness, for ". . . the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

Arnold v. Panhandle & Santa Fe Ry., 363 U.S. at 361.[7]

3. *Dice v. Akron, Canton & Youngstown R.R.*

Similarly, in *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 358 (1951), this Court held an Ohio rule of procedure could not be used to vitiate a jury's finding. The court below attempts to distinguish *Dice*, but *Dice* is particularly apposite because, as here, an unusual state rule of procedure deprived a party of his verdict. The difference between victory and defeat for Dice in the Ohio court was an unusual rule of procedure; the difference between victory and defeat for Santa Fe is an unusual Texas rule of procedure. State procedural independence in *Dice* was pre-empted by this Court in the interest of federal statutory policy:

> The trial judge and the Ohio Supreme Court erred in holding that petitioner's rights were to be determined by Ohio law and in taking away petitioner's verdict when the

[7] *Arnold* is regularly followed by the Texas courts. *See e.g. Southern Pacific Transportation Co. v. Allen*, 525 S.W.2d 300, 305 (Tex. Civ. App. – Houston [14th Dist.] 1975, no writ) ("It is true that this case is governed by Federal law and when assertions of Federal rights are plainly and reasonably made they are not to be defeated under the name of local practice [citing *Arnold*]").

> issues of fraud had been submitted to the jury on conflicting evidence and determined in petitioner's favor.

Dice v. Akron, Canton & Youngstown R.R., 342 U.S. at 363.

4. *Brown v. Western Ry. of Alabama.*

Although the Texas Court of Appeals denies it, the opinion below is based upon a distinction between substance and procedure. In *Brown v. Western Ry. of Alabama*, 338 U.S. 294 (1949), this Court rejected a distinction between substance and procedure. There is no material difference between *Brown* and the instant case. *Brown* focuses on state pleading rules, this case focuses on state appeal pre-requisites. Do the pleading rules really have greater due process dignity than the "zealously safeguarded" right of appellate review?

Citing *Brown*, and virtually inviting clarification from a higher court, the court below correctly observed:

> The United States Supreme Court has consistently rejected state procedures if these procedures destroy or diminish the substantive rights granted under the FELA. Furthermore, as previously stated, the distinction between "substance" and "procedure" is not precise.

The Atchison, Topeka and Santa Fe R.R. Co. v. Brown, 750 S.W.2d 332, 335 (Tex.App. – Eastland 1988, writ denied). Justice Black said in *Brown* laying down a precise rule to determine when local rules of procedure "dig" too far into substantive rights is impossible, and no doubt a truly precise measurement is not feasible. One principle, however, is clear: when, as here, local practice digs far enough into substantive rights to determine, of itself, the outcome of the suit, the digging has gone too far.

Broad identification of benchmarks for digging is badly needed. This Court's *Brown* opinion has been gently criticized by Professor Wright because the opinion raises more questions than it answers. Indeed, the sheer volubility of this respected authority's consideration of the questions raised by

Brown only amplifies Santa Fe's present call for clarification. *See* 16 C. Wright *et al.* FEDERAL PRACTICE AND PROCEDURE sec. 4023 (1977).

5. *Bowman v. Illinois Central R.R.*

Bowman v. Illinois Central R.R., 11 Ill. 2d 186, 142 N.E.2d 104, *cert. denied*, 335 U.S. 837 (1957), warrants special attention. The opinion is lengthy and deals with the intricacies of Illinois procedure, but the issues lie parallel to those at bar. The court discusses the scope of review of an F.E.L.A. jury's verdict when appellate consideration involves a re-weighing of the evidence. The court restated the rule of *Lavender v. Kurn*, 327 U.S. 645 (1946), and *Rogers v. Missouri Pacific Ry. Co.*, 352 U.S. 500 (1957), that jury verdicts in F.E.L.A. cases are to be accorded extraordinary deference. Citing *Dice* and *Brown*, the highest court in Illinois held:

> It is established that the rights created under this Federal statute, including the right to jury trial which is a substantial part of the relief provided, are governed not by State law but by the decisions of the Federal courts, in order that the act be given uniform application. Hence, it has been held that such rights cannot be affected by "local rule[s] of procedure."

Bowman v. Illinois Central R.R., 142 N.E.2d at 115. Thus the Illinois appellate practice customarily permitting the intermediate appellate court to re-weigh evidence was overthrown by the primacy of an F.E.L.A. verdict. The Texas practice under attack in this case should have no greater immunity than the Illinois rule of appellate procedure superceded in *Bowman*.

6. *Brady v. Southern R.R. Co.*

Again in *Brady v. Southern R.R. Co.*, 320 U.S. 476 (1943), the right to recover judgment upon a verdict is elevated above state policy. The *Brady* Court struck down a state-law sufficiency-of-the-evidence standard in conflict with an F.E.L.A.

verdict. Santa Fe submits Texas' no-appellate-review policy has no greater claim to life in F.E.L.A. cases than does the sufficiency standard overruled in *Brady*. The *Brady* Court said:

> There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers' Liability Cases, this question must be determined by this Court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act's authority in state courts. Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states. [Citations omitted]. It is true that this Court has held that a state need not provide in F.E.L.A. cases any trial by jury according to the requirements of the Seventh Amendment. [Citations omitted]. But when a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question.

Brady v. Southern R.R. Co., 320 U.S. at 479. If the *Brady* opinion means what it says, the correctness of an exonerating verdict fairly produced by the Texas jury system became a federal question that could not be vitiated by local policy precluding appellate review.

7. *Norfolk Southern R.R. Co. v. Ferebee.*

Although the procedural issue decided in *Norfolk Southern R.R. Co. v. Ferebee*, 238 U.S. 269 (1915), was different from the question at hand, nevertheless the opinion is instructive. The railroad lost in the trial court but a *partial* new trial was granted on the question of damages. Upon retrial the railroad tried to ask the jury to measure the employee's contributory negligence. The trial court refused to submit this question and rendered judgment upon a verdict favorable to the employee. The railroad appealed claiming the Act guaranteed submis-

sion of the employee's contributory negligence in connection with the assessment of damages. The appeal was rejected by this Court because, ". . . this record, in connection with the special-finding first verdict, shows that in this case the two matters were in fact *separable*, so that the splitting up the issues and granting a partial new trial did not *in this particular instance* operate to deprive the defendant of a Federal right." *Norfolk Southern R.R. Co. v. Ferebee*, 238 U.S. at 273 (emphasis added). The *Ferebee* Court went on to say:

> But a substantive right or defense arising under the Federal law cannot be lessened or destroyed by a rule of practice. . . . Under the facts, therefore, it cannot be said that the decision operated to deprive the railway company of a Federal right. But we recognize that the practice is not to be commended.

Norfolk Southern R.R. Co. v. Ferebee, 238 U.S. at 273-74. Santa Fe's exoneration was complete, not separable. In fact, the first jury found Brown caused his own injury. The relevant inference to be drawn from *Ferebee* is the granting of a new trial under circumstances tantamount to the destruction of an "inseparable" substantive defense should not be permitted.

F. Santa Fe's Authorities Are Not Distinguishable.

The Texas Court of Appeals says *Brown* and *Dice* are not applicable to the case at bar. The learned court makes no attempt to distinguish *Arnold*, *Brady*, *Bowman*, or the others, but says state court rules of procedure in *Brown* and *Dice* interfered with substantive rights granted *only to the employee*. The fresh opinion in *Monessen* lays this argument to rest, but even if *Monessen* had not been decided, due process, equal protection, and F.E.L.A. pre-emption protect the right of the railroad to have appellate review of the destruction of an exonerating verdict. To hold otherwise simply makes the railroad an insurer of the safety of its employees; again, the Act clearly does not make the railroad an insurer. *Wilkerson v. McCarthy*, 336 U.S. 53 (1949); *Tracy v. Terminal R. Ass'n of St. Louis*, 170 F.2d 635 (8th Cir. 1948). And this

case vividly demonstrates why a railroad's liability stops short of insurance of safety: winter, not Santa Fe, put ice where Brown slipped.

G. Uniformity of Application: Law Born of Logic.

Universal rail transportation now means those persons covered by the F.E.L.A. are widely dispersed among all the states. A single federal act, therefore, is applied in at least fifty-one different jurisdictions. Both logic and the underlying purposes of the F.E.L.A. require uniformity in administration of the Act. *Brady v. Southern Ry.*, 320 U.S. 476 (1943); *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 35 (1951); *Garrett v. Moore McCormack Co.*, 317 U.S. 239 (1942). Yet this compelling principle is not mentioned in the opinion below.

Forty-five state jurisdictions permit appellate review of orders granting new trials. They are identified in Appendix 3 together with examples of review from each jurisdiction. If this case had been tried in any state of the Union save Texas, Georgia, Maine, Missouri, or New Mexico, there would have been no second trial, yet Santa Fe loses in Texas for want of equal protection and due process of law. Compare, for example, the background facts and first verdict in the instant suit to those in *The Atchison, Topeka and Santa Fe Ry. Co. v. Marzuola*, 418 P.2d 625 (Okla. 1966).

In both *Marzuola* and the case at bar Santa Fe appealed from an order granting a new trial to the employee after a jury verdict exonerated the railroad of liability. Brown's complaints in his motion for new trial are no greater than Marzuola's. Yet Oklahoma allows appellate review of orders granting new trials. The *Marzuola* court concludes:

> It is our opinion the case was properly submitted to the jury, and that having rendered a verdict therein, the trial court did not exercise a sound legal discretion in granting a new trial.

The Atchison, Topeka and Santa Fe Ry Co. v. Marzuola, 418 P.2d at 629. Santa Fe therefore wins in Oklahoma but loses in Texas, and the only difference is a local rule of procedure preventing appellate review of an erroneous order by the trial court. Indeed, Santa Fe is vindicated both in federal court and in at least forty-five state jurisdictions, but loses at Sweetwater, Texas. Is this the uniform application of the Act intended by Congress, mandated so many times by this Court?

CONCLUSION.

The Texas Court of Appeals could have avoided the questions raised in this petition by simply finding error in the first trial. Instead, the court below said, without the benefit of *Monessen* and *Felder*, that the *Dice* line of cases protects only the employee. No doubt Brown will contend, as he has from the beginning of this appeal, that error was committed in the first trial; but the failure of the court below to base its opinion on alleged error in the first trial speaks volumes for the simple fact that no error was committed. The attempt by the Texas Court of Appeals to distinguish *Dice* and *Brown* is now an open invitation to this Court to settle the law.

The opinion below upholds an erroneous trial court order when it is remarkably clear under long-established doctrine that Brown's rights would have received great deference had he obtained a favorable verdict from the first jury. "There is no greater inequality than the unequal treatment by the same court of things that are equal."

Respectfully submitted,

JOHN B. LAY

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Santa Fe Railway Company

APPENDIX

APPENDIX 1

11th Court of Appeals
Eastland, Texas

OPINION

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Appellant*

vs.

LARRY V. BROWN, *Appellee*

No. 11-87-178-CV
Appeal from Nolan County

The issue in this suit is whether, under the Federal Employers' Liability Act (FELA), 45 U.S.C.A. sec. 51 et seq. (West 1986), a party may challenge the granting of a new trial in an appeal from the judgment rendered after a subsequent trial.

Larry V. Brown sued his employer, the Atchison, Topeka and Santa Fe Railway Company (Santa Fe), alleging that he was injured while working for Santa Fe. Following a jury trial on the merits, the trial court entered judgment on November 10, 1986, that Brown take nothing against Santa Fe. The judgment recited that the jury had found no negligence on the part of Santa Fe and found that the negligence of Brown was the sole proximate cause of the accident.

Brown timely filed a motion for new trial pursuant to TEX. R.CIV.P. 329b. On December 29, 1986, the trial court entered an order granting a new trial. Thereafter, the case was again tried before a different jury which returned a verdict in favor of Brown. On May 14, 1987, the trial court entered a judgment against Santa Fe for $336,775. Santa Fe appeals this judgment. We affirm.

In a single point of error, Santa Fe urges that the trial court abused its discretion in granting the new trial and contends

that the November 10, 1986, take-nothing judgment should be reinstated. We disagree.

The rule is well established in Texas that an order granting a new trial is not subject to review, either by a direct appeal from such order or by an appeal from a final judgment rendered after the subsequent trial on the merits. Cummins v. Paisan Construction Company, 682 S.W.2d 235 (Tex.1984). Our Supreme Court in *Cummins*, citing Burroughs v. Leslie, 620 S.W.2d 643 (Tex. Civ. App. – Dallas 1981, writ ref'd n.r.e.), stated:

> The motion for new trial was timely filed and the court granted the motion during its period of plenary power over the judgment. Rule 329b, TEX.R.CIV.P. An order granting a new trial within that period is not subject to review either by direct appeal from that order, or from a final judgment rendered after further proceedings in the trial court.

See also Silva v. Sentinel Life Insurance Company, 361 S.W.2d 731 (Tex. Civ. App. – El Paso 1962, writ ref'd n.r.e.), and Ebaugh v. State, 342 S.W.2d 221 (Tex.Civ.App. – Austin 1961, writ ref'd n.r.e.).

Santa Fe argues that the Texas rule is not applicable in FELA cases. We disagree. The cases cited by Santa Fe are distinguishable. In Brown v. Western Railway of Alabama, 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100 (1949), a Georgia trial court had dismissed the employee's petition after applying the Georgia rule that pleadings should be construed "most strongly against the pleader." The United States Supreme Court observed in *Brown* that it is often stated that, in FELA cases, state courts have no power to detract from "substantive rights" granted by Congress but that such courts are free to follow their own rules of "procedure." The Court noted, however, the impossibility of laying down a precise rule to distinguish "substance" from "procedure" since some rules of procedure "dig" into substantive rights. The Court held that, under the facts alleged, it was error to dismiss the petition

and that the employee should be allowed to try his case. The Court stated:

> Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws.

Similarly, in Dice v. Akron, Canton & Youngstown Railroad Company, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1951), the United States Supreme Court held that the Ohio statute which provided that the trial court, not a jury, should decide factual issues as to fraud in connection with a release executed by the employee diminished the employee's substantive rights under the FELA. The Court said:

> We have previously held that "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence'" and that it is "part and parcel of the remedy afforded railroad workers under the Employers Liability Act." Bailey v. Central Vermont R. Co., 319 U.S. 350, 354, 63 S.Ct. 1062, 87 L.Ed. 1444, 1447 (1942). We also recognized in that case that to deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence "is to take away a goodly portion of the relief which Congress has afforded them." It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere "local rule of procedure" for denial in the manner that Ohio has here used.

The cases of Rogers v. Missouri Pacific Railroad Company, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957), and Texas and Pacific Railway Company v. Roberts, 481 S.W.2d 798 (Tex. 1972), merely announce and apply the appellate standard of review of liability findings in FELA cases. Our Supreme Court in *Roberts* held that in FELA cases:

> [O]nce the appellate court determines that the verdict is supported by some evidence about which reasonable minds could differ, the appellate court's function is

exhausted. Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946).

> Review by an appellate court under the Texas "weight and preponderance" standard is precluded where liability of the employer is found by the jury; it is also precluded where the verdict exonerates the employer from liability.

The Court added:

> Common reasoning in support of this position has been either that the question is one of "substance," or that to hold applicable a state rule at variance with the federal rule would interfere with a substantive right granted by the act.

It is clear that, in all of the cases discussed above, a state court rule of procedure interfered with a substantive right granted to the employee under the FELA. This is not true in the instant case.

Santa Fe cites the cases of the Atchison, Topeka and Santa Fe Railway Company v. Marzuola, 418 P.2d 625 (Okla. 1966); Coffee v. Seaboard System Railroad, Inc., 507 So.2d 476 (Ala. 1987); Florida East Coast Railway Company v. Walker, 429 So.2d 1327 (Fla. Dist. Ct. App. 1983); Looft v. Missouri Pacific Railroad Company, 432 N.E.2d 1152 (Ill. App. Ct. 1982); and Torres v. Southern Pacific Company, 67 Cal. Rptr. 428 (Cal. App. Dep't Super. Ct. 1968), in support of its argument that orders granting new trials in FELA cases are appealable. The cases cited, however are from states which permit a direct appeal from an order granting a new trial. The rule in Texas is different.

It has long been the rule in this State that an order granting a motion for new trial is an interlocutory order and not appealable. The Court in Brown v. American Finance Co., 432 S.W.2d 564 (Tex. Civ. App. – Dallas 1968, writ ref'd n.r.e.), noted that the rule followed in Texas is also the rule in most other jurisdictions including the federal courts. See Gallimore

v. Missouri Pacific Railroad Co., 635 F.2d 1165 (5th Cir. 1981). The granting of a new trial may be attacked in an original mandamus proceeding, as opposed to an appeal, in limited circumstances. Johnson v. Fourth Court of Appeals, 700 S.W.2d 916 (Tex. 1985).

In holding that the Texas procedural rules concerning the submission of special issues did not deny the plaintiff any "substantive" rights under the FELA, the Texas Supreme Court stated in Scott v. Atchison, Topeka and Santa Fe Railway Company, 572 S.W.2d 273 (Tex. 1978):

> Our decision does not relate to burden of proof, the sufficiency of evidence, the right to a jury determination, or any of the other "substantive" rights which have been held to be governed by federal law in FELA cases. On the contrary, it deals solely with rules of procedure relating to the form, necessity, and effect of jury issues and instructions.

Likewise, the issue in this case deals solely with a procedural matter.

The order granting the motion for new trial and the subsequent retrial did not diminish any of Santa Fe's substantive rights. Indeed, Santa Fe makes no complaint of any error occuring during the second trial. We hold that the Texas procedure does not destroy or diminish any "substantive" rights granted by the FELA. See Scott v. Atchison, Topeka and Santa Fe Railway Company, supra; Missouri Pacific Railraod Company v. Cross, 501 S.W.2d 868 (Tex. 1973).

We overrule Brown's motion to dismiss Santa Fe's appeal for want of jurisdiction. This is not an appeal from an interlocutory order granting a new trial. This is an appeal of the final judgment rendered after a second trial, following the granting of the motion for new trial; therefore, this Court has jurisdiction. Cummins v. Paisan Construction Company, supra; Burroughs v. Leslie, supra.

We also deny Brown's request that we award him damages for delay pursuant to TEX. R. APP. P. 84. We have not been cited to, nor have we found, any case directly in point. The United States Supreme Court has consistently rejected state procedures if these procedures destroy or diminish the substantive rights granted under the FELA. Furthermore, as previously stated, the distinction between "substance" and "procedure" is not precise. Brown v. Western Railway of Alabama, supra. We are not convinced that this appeal was taken for the purpose of delay and without sufficient cause.

The judgment of the trial court is affirmed.

/s/Austin McCloud
AUSTIN McCLOUD
CHIEF JUSTICE

April 28, 1988
Publish. See TEX.R.APP. 90.

APPENDIX 2

IN THE SUPREME COURT OF TEXAS

January 25, 1989

NO. C-7773

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY
vs.
LARRY V. BROWN

From NOLAN County, Eleventh District

Application of petitioner for writ of error to the Court of Appeals for the Eleventh District having been duly considered, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, denied.

It is further ordered that applicant, The Atchison, Topeka and Santa Fe Railway Company, and surety, National Fire Insurance Company of Hartford, pay all costs incurred on this application.

* * *

March 1, 1989

NO. C-7773

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY
vs.
LARRY V. BROWN

From NOLAN County, Eleventh District

Petitioner/s motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

* * *

I, MARY M. WAKEFIELD, CLERK of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the Orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates of shown.

WITNESS my hand and the Seal of the Supreme Court of Texas, at the City of Austin, this the 2nd day of May, 1989.

MARY M. WAKEFIELD, CLERK

/s/By Peggy Littlefield
Peggy Littlefield, Chief Deputy

[Seal]

* * *

June 9, 1988

NO. 11-87-178-CV

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY
vs.
LARRY V. BROWN

This day came on to be heard Appellant's motion for rehearing and the same, having been duly considered, is hereby overruled.

APPENDIX 3

STATE JURISDICTIONS ALLOWING REVIEW OF ORDERS GRANTING NEW TRIALS

1. Alabama – *Coffee v. Seaboard System RR, Inc.*, 507 So.2d 476 (Ala.1987).
2. Alaska – Alaska R.App.P.23; *City and Borough of Juneau v. Thibodeau*, 595 P.2d 626 (Alaska 1979).
3. Arizona – *Webb v. Webb*, 151 Ariz. 461, 728 P.2d 680 (Ariz.Ct.App. Div.1 1986).
4. Arkansas – *Rusin v. Midwest Enamelers, Inc.*, 731 S.W.2d 226 (Ark.Ct.App. 1987).
5. California – *Torres v. Southern Pacific Company*, 67 Cal. Rptr. 428 (Cal.App.Div.4 1968).
6. Colorado – *Roberts v. Consolidated Freightways Corporation of Delaware*, 735 P.2d 894 (Colo.Ct.App. 1986).
7. Connecticut – *Prokolkin v. General Motors Corporation*, 170 Conn. 289, 365 A.2d 1180 (Conn.1975).
8. Delaware – *Huitt v. Atwood*, 526 A.2d 930 (Del.1987).
9. Florida – *Florida East Coast Ry. Co. v. Walker*, 429 So.2d 1327 (Fla.App.5 Dist. 1983).
10. Hawaii – *Au v. Kelly*, 2 Hawaii App. 534, 634 P.2d 619 (Hawaii Ct.App. 1987).
11. Idaho – *Sinclair v. Great N. Ry. Co.*, 489 P.2d 442 (Idaho 1971).
12. Illinois – *Odom v. Bowman*, 159 Ill. App. 3rd 568, 511 N.E.2d 1265 (Ill.App.Ct. 1987).
13. Indiana – *Capitol Neon Signs, Inc. v. Indiana National Bank*, 501 N.E.2d 1082 (Ind.Ct.App. 4th Dist. 1986).
14. Iowa – *Peterson v. First National Bank of Iowa*, 392 N.W.2d 158 (Iowa Ct.App. 1986).
15. Kansas – *Landscape Development Company, Inc. v. Kansas City Power & Light Co.*, 415 P.2d 398 (Kan. 1966).

16. Kentucky – *City of Louisville v. Allen*, 385 S.W.2d 179, (Ky. 1964).

17. Louisiana – *Whittle v. Miller Electrical Manufacturing Company*, 507 So.2d 266 (La.Ct.App. 1987).

18. Maryland – *Furman v. Glading*, 36 Md.App. 574, 374 A.2d 414 (Md.Ct.Spec.App. 1977).

19. Massachusetts – *Okongwo v. Stephens*, 396 Mass. 724, 488 N.E.2d 765 (Mass. 1986).

20. Michigan – *Vandewall v. Midkiff*, 166 Mich.App. 668, 421 N.W.2d 263 (Mich.Ct.App. 1988).

21. Minnesota – *Parker v. Crabtree's Kitchen*, 404 N.W.2d 872 (Minn.Ct.App. 1987).

22. Mississippi – *James v. Jackson*, 514 So.2d 1224 (Miss. 1987).

23. Montana – *Priest v. Taylor*, 740 P.2d 648 (Mont. 1987).

24. Nebraska – *Omaha Mining Company, Inc. v. First National Bank of Bellevue*, 226 Neb. 743, 415 N.W.2d 111 (Neb. 1987).

25. Nevada – *Jaramillo v. Blackstone*, 101 Nev. 316, 704 P.2d 1084 (Nev. 1985).

26. New Hampshire – *Hodgdon v. Beatrice D. Weeks Memorial Hospital*, 128 N.H. 366, 515 A.2d 1199 (N.H. 1986).

27. New Jersey – *Jackson v. Consolidated Rail Corp.*, 223 N.J. Super. 467, 538 A.2d 1310 (N.J.Super.Ct.App.Div. 1988).

28. New York – *Nazito v. Holton*, 96 A.D.2d 550, 465 N.Y.S.2d 62 (N.Y.App.Div. 1983).

29. North Carolina – *Murrow v. Daniels*, 321 N.C. 494, 364 S.E.2d 392 (N.C. 1988).

30. North Dakota – *Nelson v. Trinity Medical Center*, 419 N.W.2d 886 (N.D. 1988).

31. Ohio – *Jiminez v. Ramos*, 25 Ohio App.3d 58, 495 N.E.2d 962 (Ohio Ct.App. 1985).

32. Oklahoma – *The Atchison, Topeka and Santa Fe Ry. Co. v. Marzuola*, 418 P.2d 625 (Okla. 1966).

33. Oregon – *Shepard v. Sisters of Providence in Oregon*, 89 Or.App. 579, 750 P.2d 500 (Or.Ct.App. 1988).

34. Pennsylvania – *Boscia v. Massaro*, 365 Pa.Super. 271, 529 A.2d 504 (Pa. 1987).

35. Rhode Island – *Mazzaroppi v. Tocco*, 533 A.2d 203 (R.I. 1987).

36. South Carolina – *Jones v. Ingles Supermarkets, Inc.*, 293 S.C. 490, 361 S.E.2d 775 (S.C.Ct.App. 1987).

37. South Dakota – *Larson Electrical Company, Inc. v. R.W. Vander Vorste d/b/a Community Electric Company and New Amsterdam Casualty Company*, 134 N.W.2d 500 (S.D. 1965).

38. Tennessee – *Panzer v. King*, 743 S.W.2d 612 (Tenn. 1988).

39. Utah – *Donahue v. Intermountain Health Care, Inc.*, 748 P.2d 1067 (Utah 1987).

40. Vermont – *Krupp v. State Highway Board*, 125 Vt.25, 209 A.2d 320 (Vt. 1965).

41. Virginia – *Stubbs v. Cowden*, 179 Va. 190, 18 S.E.2d 275 (Va. 1942).

42. Washington – *Dybdahl v. Genesco, Inc.*, 42 Wash.App. 486, 713 P.2d 113 (Wash.Ct.App. 1986).

43. West Virginia – *Cook v. Harris*, 159 W.Va. 641, 225 S.E.2d 676 (W.Va. 1976).

44. Wisconsin – *Maluka v. Tucker*, 117 Wis.2d 1, 343 N.W.2d 407 (Wis.Ct.App. 1983).

45. Wyoming – *Texas West Oil and Gas Corp. v. Fitzgerald*, 726 P.2d 1056 (Wyo. 1986).